A GUIDE TO CONSTITUTIONAL NEGOTIATIONS IN CANADA*

Current Issue Paper #176

ONTARIO LEGISLATIVE LIBRARY
BIBLIOTHÈQUE DE L'ASSEMBLÉE
LÉGISLATIVE DE L'ONTARIO

Ontario
Legislative
Library

Bibliothèque de
l'Assemblée législative
de l'Ontario

Legislative Research Service
Room 2520, Whitney Block
99 Wellesley Street West
Toronto, Ontario M7A 1A9

(416) 325-3675
(416) 325-3637
(416) 325-3696 Fax

Service de recherches
Bureau 2520, édifice Whitney
99, rue Wellesley ouest
Toronto (Ontario) M7A 1A9

(416) 325-3675
(416) 325-3637
téléc. : (416) 325-3696

ISSN 0835-0299

A Guide To Constitutional Negotiations In Canada*

Current Issue Paper #176

Prepared by:

Paul Murray, Research Officer
Legislative Research Service

June 1996

*The Legislative Research Service is a branch of the Ontario Legislative Library which provides confidential non-partisan research analysis to Members of all parties of the Legislative Assembly and to legislative committees.

TABLE OF CONTENTS

INTRODUCTION

Constitutional negotiations in Canada have been ongoing at one level or another for over thirty years. Although there have been many issues on the table, one continuing issue has been the status of Quebec and its expression in the Constitution. When the Constitution was successfully patriated (brought home) from the United Kingdom in 1982, it occurred without Quebec's consent. While constitutional discussions since that time have not focused exclusively on Quebec, attempts to bring Quebec back into the constitutional fold have played a major role throughout those negotiations. However, despite considerable efforts, two recent attempts at a resolution of Canada's constitutional debates — the Meech Lake and Charlottetown Accords — proved unsuccessful.

Quebec's desire for some form of constitutional accommodation therefore remains unmet. On October 30, 1995, this situation very nearly led the people of Quebec to vote in favour of sovereignty. Though the referendum was defeated, the narrow margin of victory — 50.6% to 49.4% — has pushed talk of constitutional change once again onto the national agenda.

As Canadians embark on a new round of constitutional negotiations, there is a sense that with another Quebec referendum awaiting the outcome, we cannot afford to repeat our past failures. If those failures are to be avoided, participants will need to understand the issues to be addressed and know why we have been unable to reach agreement on them in the past. Consideration of these matters requires an understanding of the Constitution, the recent history of constitutional negotiations, the issues raised in previous rounds, and the process ahead. This paper attempts to provide such information with the hope that it will further discussion on these and other matters as Canadians set off again on the path of constitutional renewal.

THE CONSTITUTIONAL FRAMEWORK

The "Constitution" of Canada

Before turning to the documents which make up the Constitution of Canada, it is helpful to first consider what a constitution does. A constitution embodies the fundamental law of a country:

> Constitutional law is the law prescribing the exercise of power by the organs of a State. It explains which organs can exercise legislative power (making new laws), executive power (implementing the laws) and judicial power (adjudicating disputes), and what the limitations on those powers are. In a federal state, the allocation of governmental powers (legislative, executive and judicial) among central and

> regional (state or provincial) authorities is a basic concern. The rules of federalism are especially significant in Canada because they protect the cultural, linguistic and regional diversity of the nation. Civil liberties are also part of constitutional law, because civil liberties may be created by the rules that limit the exercise of governmental power over individuals.[1]

The difficulty is that no single document embodies all of Canada's constitutional law, as there is, for example, in the United States. Instead, there are many documents which have constitutional status. Moreover, there is no one source to which one can look to identify all of the documents which make up the Constitution of Canada.[2]

However, the *Constitution Act, 1982*, provides an important definition of the Constitution.

> S. 52(2) The Constitution of Canada includes:
>
> (a) the *Canada Act, 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).

The Acts and orders in the schedule referred to include: the *Constitution Act, 1867*; statutes which have amended that Act; the orders-in-council and statutes admitting or creating new provinces or altering boundaries; and, the *Statute of Westminster, 1931* (discussed below). There are in total 30 Acts and orders referred to in the schedule.[3]

While the definition does not preclude other documents from having constitutional status, inclusion in the definition has two very significant consequences: it means that those documents are subject to both the supremacy clause of the *Constitution Act, 1982* and the entrenchment clause. The supremacy clause provides that the Constitution of Canada, as defined, is the supreme law of Canada and any law that is inconsistent with it is, to the extent of the inconsistency, of no force or effect.[4] The entrenchment clause provides that any amendments to the Constitution may only be made in accordance with the authority contained in the Constitution of Canada.[5] This means that the statutes referred to in the definition of the Constitution may only be amended through the special amending procedures laid down in Part V of the *Constitution Act, 1982*.

In addition to those defined in the *Constitution Act, 1982*, a number of important documents and conventions shape Canada's constitutional framework. For example, the definition does not include any of the pre-1867 documents which

governed Ontario and Quebec. Nor does it include the body of conventions which regulate the system of responsible government.[6] Conventions are rules of the constitution that are not enforced by the law courts. These include, for example, the convention which stipulates that the Governor General and Lieutenant Governors in Council will exercise the powers conferred on them only in accordance with the advice of cabinet or the Prime Minister. As well, while the Queen and the Governor General (and the Lieutenant Governors in the provinces) have the formal power to withhold royal assent from a bill, a convention stipulates that royal assent will never be withheld.[7]

Of the documents which make up the Constitution of Canada, the two most important are the *Constitution Act, 1867* and the *Constitution Act, 1982*. Because of their significance, and their relation to ongoing constitutional issues, they are briefly outlined below.

Constitution Act, 1867

Historically, the most significant constitutional document has been the *British North America Act, 1867*,[8] which was renamed the *Constitution Act, 1867* in 1982. This Act created the new Dominion of Canada by uniting three of the colonies of British North America (Canada, Nova Scotia and New Brunswick), and provided the framework for the admission of all the other British North American colonies and territories.

The *Constitution Act, 1867*, however, did not represent a clean break from the United Kingdom. It did not, for example, include any general procedure for amending the constitution. As a result, until 1982, any amendments to the Act had to be enacted by the British Parliament. Another significant omission was that while the Constitution gave authority for the Supreme Court of Canada to be established, it did not itself establish the Court as the judicial body with final say on legal matters. Rather, until 1949 — eighty-two years after confederation — the Judicial Committee of the Privy Council in England was the final appellate body for legal disputes arising in Canada.[9]

Despite these omissions, the *Constitution Act, 1867* did address most of the significant aspects of Canada's constitutional framework. Specifically, the Act provided for, among other things:

- the creation of the Dominion of Canada through the Union of the Provinces of Canada, Nova Scotia and New Brunswick;
- the continuation of executive power in the Queen;
- the creation and composition of the political institutions of the federal Parliament and the provincial Legislatures, including the Senate, the House of Commons and the legislative assemblies of the provinces;

- the distribution of legislative powers between the federal Parliament and the provincial legislatures;

- the appointment of judges to the superior courts of the provinces and the establishment of a general court of appeal for Canada; and

- the admission of other colonies into the Union.[10]

Most issues on which constitutional discussions have focussed have related either to the content of the *Constitution Act, 1867* or to its omissions. These matters include issues such as: the distribution of powers between the federal and provincial legislatures; the role and composition of the Senate; and, the entrenchment of the Supreme Court. Significant omissions from the *Constitution Act, 1867* were the failure to include: a bill of rights; an amending procedure; and, recognition of the rights of the aboriginal peoples to self-government. The *Constitution Act, 1982* addressed some of these issues, though by no means all of them, and at a price.

Constitution Act, 1982

The process leading up to the adoption of the *Constitution Act, 1982* is discussed later in this paper. At this point, it is enough to point out that its adoption in Canada occurred without the agreement of Quebec, and this failure, more than anything else, has led to the continuing constitutional uncertainty which exists in Canada.

The *Constitution Act, 1982* itself forms a schedule to the *Canada Act, 1982*. The *Canada Act, 1982* is a short statute, only four sections long, but includes the following important clause which terminates the power of the United Kingdom to legislate in Canada:

> S. 2 No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

The *Canada Act, 1982* also enacted the *Constitution Act, 1982*. The *Constitution Act, 1982* includes the following important elements:

- a *Canadian Charter of Rights and Freedoms*, which guarantees to Canadians certain fundamental freedoms and democratic, mobility, legal and equality rights; these rights and freedoms are subject to reasonable limits and are enforceable against the governments and legislatures of Canada;

- recognition of existing aboriginal and treaty rights of the Aboriginal peoples of Canada;

- a commitment to the principle of making equalization payments and to promoting equal opportunities for Canadians;

- procedures for amending the Constitution of Canada, which vary depending on the amendment sought; for example, requiring unanimous consent of the provinces and the federal parliament in some instances, and in others only approval of the federal government and two-thirds of the provinces representing fifty per cent of the population of all of the provinces; and

- a concurrent power between the federal and provincial governments to regulate interprovincial trade in natural resources and to levy indirect taxes on these resources.[11]

A number of the issues which continue to attract attention in constitutional negotiations relate to either the process surrounding the adoption of the *Constitution Act, 1982* or to its provisions. As mentioned, Quebec has never accepted the patriation of the Constitution, holding out in particular for some recognition of Quebec's distinct nature. Two other major areas of debate in relation to the *Constitution Act, 1982* are the amending procedures contained in the Act, and the aspirations of the Aboriginal peoples for express recognition of their inherent right to self-government.

The *Constitution Act, 1867* and *Constitution Act, 1982* make up the framework within which current constitutional debates occur. Before outlining in more detail recent proposals for change to these documents, it is helpful to sketch the history of constitutional negotiations, including the events leading to the *Constitution Act, 1982* and the more recent constitutional negotiations that resulted in the Meech Lake and Charlottetown Accords.

The History of Negotiations

Setting the Stage

The achievement of Confederation in 1867 should not be confused with independence. Canada remained at that time — and for some time after — under the control of the United Kingdom in a number of important respects. Most significantly, the UK retained the power to enact statutes extending to Canada, and Canada lacked the capacity to enact any statute which was inconsistent with an imperial statute which applied to Canada.[12]

Although by 1926 Canada had achieved substantial practical independence, a court decision at that time brought to the fore renewed concerns about its formal status as a dominion of the United Kingdom. In the case of *Nadan v. The King*,[13] the British Privy Council struck down a federal statute which purported to abolish appeals from the Supreme Court of Canada to the Privy Council in criminal cases. The Privy Council concluded that the statute exceeded Canadian legislative power because of its inconsistency with two imperial statutes and its extra-territorial

effect (it purported to alter the powers of a British court). Canada's concerns over this case, among other matters, as well as the concerns of other dominions in relation to their own independence, led to a conference in 1926 on the issue of removing the last remaining vestiges of colonial status.[14] The result was the adoption of the *Balfour Declaration* which stated:

> They [the United Kingdom and the dominions] are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, although united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[15]

This declaration effectively recognized the independence of Canada and other self-governing dominions of the United Kingdom.

However, the *Balfour Declaration* was a political statement and it was not until the adoption of the *Statute of Westminster, 1931* that this declaration was given legal effect. The *Statute of Westminster, 1931*[16] included three important provisions. It provided that:

- no United Kingdom statute could extend to a dominion unless it was expressly declared in the statute that the dominion had requested, and consented to, the enactment;

- each dominion was granted the power to repeal or amend imperial statutes which had become part of the law of the dominion; and

- the above two provisions would not apply to the repeal, amendment, or alteration of the British North America Acts, 1867 to 1930, or to any order, rule or regulation made thereunder.[17]

The reason for this last clause, which was inserted at Canada's request, was to prevent important constitutional documents from being unilaterally amended by either the federal Parliament or the Legislatures. These documents would still require a British statute for their amendment (until 1982). This was a necessary compromise because federal and provincial leaders, who had met as early as 1927 to discuss a process for amending Canada's constitutional documents, had been unable to reach agreement on the matter.

The *Statute of Westminster, 1931* therefore achieved effective independence for Canada but left unresolved the issue of an amending procedure for Canada's constitutional documents. For the next forty years, this would be the key topic of constitutional discussion. However, despite continued efforts over that time — at

conferences in 1935, 1950 and through the early 1960s — no agreement could be reached on an amending formula for the constitution.[18]

The failure to resolve this issue proved significant. While efforts to agree on an amending formula continued into the early 1960s, constitutional politics became more complicated as the Quiet Revolution in Quebec took hold. The aspirations that grew out of this period in Quebec raised the constitutional stakes, as Quebec now began to look for recognition of its special status as the homeland of one of Canada's founding peoples.[19]

The joining of Quebec's desire for constitutional recognition of its unique place in Canada with the unresolved issue of an amending procedure for the Constitution, began a new era in constitutional negotiations. The succeeding period of negotiations, seemingly unbroken from the mid-1960s to the present time, has been traced by one noted commentator of constitutional negotiations as involving five rounds of constitutional politics.[20]

Round One: Victoria 1971

The first period of modern constitutional negotiations stretches from 1964 to 1971. In 1964, after years of trying, agreement appeared to be reached on an amending formula for the Constitution. The Fulton-Favreau formula, as it was termed, provided protection for Quebec's traditional concerns regarding amendments to the division of powers and the status of the French language. However, in the months that followed, the initial agreement on the Fulton-Favreau formula faded. Pressure grew in Quebec for assurances that the amending formula would not impede its ability to obtain the type of broader constitutional change needed to meet the growing aspirations for recognition of its special status. Ultimately, in January 1966, Quebec withdrew its support for the proposed formula for amending the Constitution.[21]

Constitutional discussions, nonetheless, continued over the following period, but did not again reach a level of national significance until February 1968 when a federal-provincial constitutional conference was called. On the eve of the conference, the federal government released a policy statement articulating its agenda for constitutional change. The tenor of the statement was significant, as it argued for a constitutional review that went beyond Quebec's concerns, stating that the constitutional agenda should be guided by a search for changes that would strengthen the sense of Canadian community. Foremost among the answers the statement itself gave was the adoption of a constitutional bill of rights.[22]

Despite the renewed efforts to achieve constitutional change, further meetings over the period leading into 1970 met with no success, until two developments occurred. First, in April 1970, Quebec elected a new government under the leadership of Robert Bourassa. Second, the federal government decided to abandon its idea of a full constitutional review, seeking instead a small package of reforms. By 1971, a new package of limited reforms had been put together for consideration at a full-fledged constitutional conference in Victoria in June 1971.

The reforms considered included a bill of rights, a commitment to overcome regional disparities, constitutional recognition of the Supreme Court, an amending formula and, as an attempt to satisfy one of Quebec's particular concerns, limits on the federal government's role in social policy.[23]

The First Ministers met for three days, emerging with agreement on the Victoria Charter which addressed each of the elements noted above. On the issue of social policy, it provided for concurrent jurisdiction between the federal and provincial governments over family, youth and occupational training allowances. No mechanism, however, was agreed to on how to compensate provinces who chose not to participate in federal initiatives in these areas. Federal and provincial leaders agreed to take ten days to see if their governments supported the agreement sufficiently to put it before their legislatures for approval. Within five days, Premier Bourassa called to say that the Quebec government had rejected the agreement and singled out uncertainty with respect to the language of the social policy provisions. However, there had also been a more general disfavour with the agreement by key Quebec organizations. At any rate, Quebec's rejection killed the deal. Rather than impose a constitutional settlement on Quebec, the Trudeau government and the other parties let it die.[24]

Round Two: Quebec Separatism 1976

In the years immediately following the collapse of the Victoria Charter there was little desire to bring constitutional politics onto the national agenda. However, other developments at this time were to change the face of future constitutional negotiations. In the early 1970s, the Aboriginal peoples began to be heard on the constitutional playing field. In 1973, the Supreme Court of Canada brought down a landmark decision giving clear recognition to the existence of aboriginal title in Canadian law.[25] This altered the federal government's approach to land claims negotiations, and provided a basis for seeking a broader recognition of Aboriginal peoples. At around the same time, the perspective of the Western provinces had grown from one of disinterest to grievance. The "energy crisis" of the 1970s and related federal government policies were of great concern to the resource-rich provinces of the West, which responded with calls for their own constitutional protections, through, for example, a restructured Senate.[26]

Although such constitutional issues were discussed and debated over this period, it was not until the election of the Parti Québécois, led by René Lévesque, in 1976, that constitutional negotiations once again took off. A spate of constitutional analysis and consultation followed, with the appointment of a Task Force on Canadian Unity in 1977,[27] and the release of the federal government's *A Time for Action*,[28] its agenda for constitutional reform, in 1978. The provinces put out their own proposals for reform, many of which addressed the issue of Senate reform. Throughout all of this, the Quebec government kept its distance from proposals to restructure the Canadian federation. Indeed, it was only once federal-provincial negotiation had failed that Quebec came out with *Quebec-Canada: A New Deal*,[29] its blueprint for sovereignty association.[30]

The issues under discussion at this time had expanded well beyond those in Victoria in 1971. To the previous issues — which had included the Charter of Rights, the Supreme Court, the amending formula and a commitment to reducing regional disparities — were added proposals in relation to the Senate, the division of powers and restrictions on the exercise of the federal spending power. Though a constitutional conference was held in February 1979, no agreement was reached. The Trudeau government was defeated in the House of Commons in February 1980, and the matter of constitutional reform passed into a new phase.[31]

Round Three: *Canada Act, 1982*

Within months of his defeat Trudeau was re-elected. Then, in May 1980, the Lévesque government put sovereignty association to a referendum vote and lost. Suddenly, the constitutional battleground had been recast. During the referendum campaign, Trudeau had promised to take action to renew the Constitution in the event of a "no" vote.[32] In June and September 1980, federal-provincial constitutional conferences were held; however, this time it was not only Quebec with whom the federal government could not reach agreement. The September meeting ended acrimoniously, and within a month, Trudeau announced that his government would move unilaterally to patriate the Constitution, and to make other constitutional changes that included an amending formula, a Charter of Rights and a declaration of the principle of fiscal equalization.[33]

Over the next year, the federal government attempted to gain support for its constitutional program. Two provinces, New Brunswick and Ontario supported the initiative from the outset. The federal NDP party came onside with the addition of an amendment that added to provincial powers over natural resources. However, the key factor in establishing broad public support for the initiatives came through the efforts of a special parliamentary committee struck to hold hearings on the constitutional proposals. The Committee's work ultimately resulted in some significant amendments to the proposals, including the addition of clauses which addressed gender rights, aboriginal and treaty rights, the multicultural heritage of Canadians, and the addition of mental and physical disability as a prohibited ground of discrimination.[34]

While public support for the constitutional proposals grew, the provinces which opposed the changes took their fight to the courts, arguing that the federal government could not unilaterally patriate the Constitution. In September 1981, the Supreme Court of Canada concluded that while there was no legal requirement that the federal government obtain the consent of the provinces, a constitutional convention existed that required a "substantial degree" of provincial consent for such actions.[35] While the decision removed any legal barriers to the federal government's actions, the Prime Minister chose to respect the convention and attempted an agreement with the provinces.

In November 1981, the First Ministers met again, and, through a series of compromises on both sides, agreement was reached with all of the provinces except Quebec. The federal government compromised on the proposed amending

formula, and added a clause which would permit the provinces to pass legislation which could have effect despite the *Charter of Rights* (an "override clause"). At the same time, the provinces gave way on the demand for Senate reform. Quebec, however, did not accept the deal. Quebec was concerned that the proposed amending formula would permit amendments to be adopted which transferred power to the federal Parliament, without financial compensation for a province that chose to opt out of the transfer.

Following the accord, Trudeau attempted to address Quebec's concerns by agreeing that fiscal compensation would be provided if a province opted out of a transfer of powers, but only in relation to powers over education or other cultural matters. Another proposed change was intended to accommodate Quebec's policy of requiring new immigrants to educate their children in French schools. Still, the Quebec government refused to accept the accord.[36]

As a result, the package of reforms went forward without Quebec's consent. The reforms were quickly approved in December 1981 by both Houses of the Canadian Parliament, then by the British Parliament in March 1982. Finally, in a signing ceremony on April 17, 1982, the Queen proclaimed the *Canada Act, 1982* in force.[37]

Though the changes achieved were significant, constitutional issues such as the status of the Supreme Court, Senate reform and the division of powers, some of which had spanned a generation, were left unaddressed. Most important, however, was the division created by patriating the Constitution without Quebec's consent. An event which should have been a unifying moment has instead echoed as a symbol of Quebec's unresolved aspirations within the Canadian community, and served as a lightning rod for the independence movement.

Round Four: Meech Lake 1987

Not surprisingly, constitutional discontent did not disappear with the patriation of the Constitution. Quebec challenged — unsuccessfully — the legality of the patriation, arguing that its consent was needed in order to satisfy the convention that required a "substantial degree" of provincial consent for constitutional amendments.[38] While Quebec regrouped, other concerns came to the fore — those of the Aboriginal peoples.

The *Constitution Act, 1982* had provided that a constitutional conference was to be held within one year to discuss the further identification and definition of the rights of the Aboriginal peoples.[39] The conference, held in March 1983, led to three constitutional amendments: one recognized land claims settlements, according them the status of treaties; another provided that aboriginal and treaty rights were guaranteed equally to men and women; the third ensured the participation of Aboriginal leaders in constitutional discussions affecting provisions related to aboriginal matters.[40] While these changes were important, the key concern — an Aboriginal right to self-government — was not resolved. Instead, a constitutional amendment committed the government to holding two more

constitutional conferences to discuss the issue. In fact, three further conferences were held — in 1984, 1985 and 1987.

Although the federal government and some provinces were prepared to recognize a contingent right to self-government — which would recognize self-government once the details were negotiated — Aboriginal representatives sought a broader, and less conditional, recognition of their inherent right to self-government. This proved too uncertain for governments to accept and the 1987 conference ended without agreement.[41]

Shortly after this conference, constitutional discussions shifted away from aboriginal concerns to Quebec. Quebec had re-elected Premier Bourassa in December 1985 on a pledge to negotiate five minimum pre-conditions to Quebec's acceptance of the Constitution: recognition of Quebec as a distinct society; a strengthened role for Quebec in immigration; a role in the selection of Quebec's judges on the Supreme Court; the ability to opt out of federal spending programs; and, a veto on constitutional amendments affecting its interests. A series of negotiations followed on these issues. Then, in April 1987, at a First Ministers' meeting at Meech Lake, Quebec, agreement was reached. In the process, Quebec's conditions had been generalized so that they applied to all of the provinces, with the exception of the distinct society clause.[42]

Following further revision, the final version of the Meech Lake Accord was signed on June 3, 1987. The process for its adoption required the approval, within three years, of the federal Parliament and the Legislatures of each of the provinces. Some crucial decisions at this stage were to play a significant role in the subsequent failure of Meech Lake. First, only two of the amendments in the Accord required unanimity, but everyone agreed that the Accord had to be accepted on an all or nothing basis. Second, although many provinces chose to hold public hearings on the Accord, Quebec took the position that it would not consider any changes that might arise from the hearings. The resulting, after-the-fact, consultation with the public, contributed significantly to the criticism and lack of public support for the Accord. Third, no schedule was agreed to among federal and provincial leaders to ensure that ratification occurred as quickly as possible within the three year timeframe.[43]

The content of the Accord was also attacked from a number of quarters. There was considerable popular resentment at the notion of a special status for one province. Criticism also came from supporters of the *Charter* who saw the Accord as a threat to its strength. Moreover, the Accord was seen as potentially weakening national social programs. Combined with criticisms of the process followed in adopting the Accord, the armoury for those who opposed the Accord was substantial.[44]

By mid-1988, the federal government and eight of the provinces, including Quebec, had ratified the Accord — only Manitoba and New Brunswick remained. Then came the Supreme Court's decision striking down part of Quebec's language law, Bill 101, on the basis that it contravened the Charter's protection of language

rights.[45] Quebec's objection to this decision, and its subsequent passage of new language legislation through the use of the notwithstanding clause of the Constitution, created considerable division across the country. This division contributed significantly to public criticism of Meech Lake's recognition of Quebec's distinct status. In 1989, when New Brunswick and Manitoba held hearings on the Accord, much of the criticism was directed at this aspect of the Accord. Then, in April 1990, Newfoundland withdrew its support for the Accord, on the basis of its opposition to the recognition of Quebec's distinct status.[46]

With the Meech Lake Accord in trouble, an attempt was made to address the concerns of the dissenting provinces. The result was a companion accord signed on June 9, 1990 — fourteen days before the Meech Lake Accord had to be ratified. The companion accord committed the federal and provincial governments to a series of constitutional initiatives including: public hearings on inclusion of a "Canada clause" in the Constitution; a commission to develop proposals on the Senate; redistribution of Senate seats in the event comprehensive Senate reform was not achieved by July 1995; meetings with the Aboriginal peoples; amendments to strengthen sexual equality and language rights; and further reviews of the amending formula.[47]

The next week New Brunswick ratified the Accord. However, in Manitoba, attempts to ratify the Accord were held up when MLA Elijah Harper protested the failure to include any constitutional accommodation of the concerns of the Aboriginal peoples. Though the Manitoba government could have pressed through ratification, no one wanted to incur the political risks of enforcing such a solution. In the meantime, the Newfoundland government waited to see what the result would be in Manitoba. Then the federal government tried a last-minute strategy — to ask the Supreme Court to extend the time for Manitoba to approve the Accord — but only if it was first approved by Newfoundland. Instead of bowing to such pressure, the Newfoundland legislature adjourned without holding a vote. The Meech Lake Accord was dead.[48]

Round Five: Charlottetown 1992

Other aborted constitutional accords were followed by at least a brief period of relative constitutional calm. The death of Meech only led to a renewed spirit within Quebec for a restructuring of its status within Canada. By the end of 1990, both the Quebec Liberal party and Quebec's National Assembly had appointed committees to bring forward proposals on the future of Quebec. The results, the Allaire Report[49] and the Bélanger-Campeau Report,[50] were released in January and March 1991, respectively, and both called for a fundamental restructuring of Quebec's relationship with the rest of Canada.[51]

In response, the Quebec government passed legislation in May 1991 which committed it to holding a referendum on sovereignty not later than October 28, 1992. Two committees were also established: one to explore the implications of sovereignty; the other to consider any offers for a new constitutional partnership that might be forthcoming from the federal government.[52]

By the end of 1990, the federal government had begun its own public consultation process, entitled "A Citizen's Forum on Canada's Future," which met broadly with Canadians to gain their input on constitutional issues.[53] At the same time, a joint parliamentary committee was struck, the Beaudoin-Edwards committee, to examine the amending process. Then, in May 1991, the federal government announced that it would develop its own constitutional proposals and hand them over to a special parliamentary committee for public consultation. At the same time, there would be a parallel Aboriginal consultation process which would form the basis of the position of Aboriginal leaders in constitutional negotiations.[54]

By September 1991, the federal proposals were ready. They included 28 recommendations addressing eight broad areas: a Canada Clause; distinct society; Charter changes; Aboriginal self-government; Senate reform; the Supreme Court; economic union; and the division of powers.[55] A joint parliamentary committee (Beaudoin-Dobbie) then held hearings on these proposals across the country; their consultations included five conferences on particular constitutional issues attended by politicians, experts and ordinary citizens.[56] At the same time, each of the provinces and the territories held their own consultation processes, including the Select Committee on Ontario in Confederation. By the end of February 1992, the Beaudoin-Dobbie committee released its report proposing a wide range of changes to the Constitution.[57]

There followed a series of negotiations from March to June 1992. At the table were political leaders from each of the provinces (except Quebec), territories and the federal government, as well as Aboriginal leaders. An impasse occurred on Senate reform, but agreement on this issue too was reached in July 1992. Quebec then joined negotiations and through a series of First Ministers' meetings in July and August an agreement was reached. The result, a package of reforms known as the Charlottetown Accord, was officially signed on August 28, 1992 in Charlottetown.[58]

The terms of the Charlottetown Accord, outlined in the next part of the paper, involved a complex package of sixty proposals. The entire package was put to a national referendum, provided for by federal legislation and Quebec's legislation which required a referendum to be held on any binding federal offers. The result of the referendum would not be binding; however, ratification of the Accord by Parliament and the Legislatures was expected to follow a yes vote.[59]

The referendum was held on October 26, 1992. The question put to both Quebec voters and Canadians in other provinces was: "Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?" The answer was no; Canadians did not agree. The reforms were rejected, both by a majority of Canadians (54.2% to 44.8%), as well as by a majority in six provinces (including Quebec) and one territory.[60]

After the defeat of the Charlottetown Accord, the consensus seemed to be that constitutional matters should be put on the shelf for awhile. Indeed, since the election of the Chrétien government in 1993, the federal government has been at

pains to stress that its priorities lie with the economy. It has resisted any suggestion that constitutional matters form part of its agenda before April, 1997, when the Constitution requires that a constitutional conference be held on the amending formula.[61]

However, with the election of the Bloc Québécois across the province of Quebec in the 1993 federal election, the Parti Québécois victory in the 1994 provincial election, and a 1995 referendum which came perilously close to a vote for a sovereign Quebec, a new push for constitutional change must be faced.

The Issues: A Look Back to Meech Lake and Charlottetown

Before examining the developments which have followed the 1995 Quebec referendum and the process ahead, it is useful to consider first, in more detail, the constitutional issues that were at stake in the Meech Lake and Charlottetown Accords, and which likely foreshadow constitutional discussions ahead.

The Meech Lake Accord

As noted above, the Meech Lake Accord grew out of Quebec's five conditions for acceptance of the *Constitution Act, 1982*. To recall, these conditions were: recognition of Quebec as a distinct society; a greater provincial role in immigration; a provincial role in appointments to the Supreme Court of Canada; limitations on the federal spending power; and, a veto for Quebec on constitutional amendments.[62]

The Accord addressed these conditions in the following way:

- *Distinct Society*. A new section was to be added to the *Constitution Act, 1867* which provided that the Constitution of Canada was to be interpreted in a manner consistent with the dual, French-English language character of Canada, and with the recognition that Quebec constituted, within Canada, a distinct society. The section also affirmed the role of Parliament in preserving the dual character of Canada and the role of Quebec in promoting the distinct identity of Quebec. It made clear that this clause was not intended to alter the powers of either the federal or provincial governments, or affect the provisions of the Constitution which relate to the multicultural heritage of Canada and the Aboriginal peoples.[63]

- *Senate*. The *Constitution Act, 1867* was to be amended to provide that vacancies in the Senate would be filled by selecting a person from a list of candidates submitted by the provincial government to which the vacancy related. The intent was for further Senate reform to be undertaken at a later date. As well, the Accord provided for annual constitutional conferences to be held starting in 1988 to consider, among other things, "Senate reform, including the role and functions of the Senate, its powers, the method of selecting Senators and representation in the Senate."[64]

- *Immigration.* The Accord would have imposed on the federal government an obligation to negotiate agreements in relation to immigration or the admission of aliens into a province, with any province that wished to enter such an agreement. The Accord conferred a constitutional status on such agreements and provided a process by which agreements could be amended. This provision was of particular importance to Quebec which currently has agreements in place which enable it to participate in the selection of persons who wish to settle permanently or temporarily in Quebec. However, at present those agreements can be unilaterally amended by the federal government.[65]

- *Supreme Court of Canada.* The Accord would have entrenched in the Constitution the existence of the Court, as well as its jurisdiction, composition and the process of judicial appointments. By entrenching the composition of the court, the existing practice that three of the nine judges are drawn from the bench or bar of Quebec would have been protected. The Accord also provided that appointments were to be made from lists submitted by the provinces and that the appointment had to be acceptable to the federal government. Quebec would have been able to submit names in relation to appointments to their component of the Court, but not in relation to other appointments. Amendments to constitutional provisions relating to the Court were to require unanimous consent.[66]

- *Spending Power.* A new section was to be added to the *Constitution Act, 1867* in relation to the federal government's creation of new shared-cost programs in areas of exclusive provincial jurisdiction. If the government created such a program, it would be required to provide reasonable compensation to a province that chose not to participate, as long as the province carried on a program that was compatible with national objectives. This would have limited the federal government's use of its spending power, as at present Parliament need not compensate provinces that choose not to participate in a national shared-cost program. This can be a powerful incentive for provinces to participate.[67]

- *Amending Formula.* The Accord provided for two changes to the constitutional amending formula in the *Constitution Act, 1982*. First, the Accord provided that in relation to amendments which would transfer legislative powers from the provincial governments to the federal government, a province could opt out of the amendment and receive compensation. Second, the Accord would have taken a number of matters which can currently be amended by seven provinces representing 50% of the population and made them subject to the unanimity procedure. These matters included amendments affecting the Senate, the House of Commons, the Supreme Court of Canada, the extension of existing provinces and the establishment of new provinces. This amendment would have effectively recognized Quebec's veto while respecting the equality of each of the provinces.[68]

- *First Ministers' Conferences.* The Accord would have established a requirement that a conference be held each year to discuss the state of the Canadian economy. As well, an annual constitutional conference was to be held to discuss Senate reform, roles and responsibilities in relation to fisheries, and other agreed upon matters.[69]

As noted earlier, the companion accord was signed in June 1990. It provided for a series of constitutional initiatives to follow proclamation of the Meech Lake Accord. On the Senate, the companion accord provided for the appointment of a commission to develop proposals for reform. Perhaps most important, if comprehensive reform was not achieved by July 1, 1995, then the companion accord provided that there would be a redistribution of Senate seats: Ontario would give up six seats and New Brunswick and Nova Scotia two each, with Newfoundland, Manitoba, Saskatchewan, Alberta, and British Columbia each gaining two seats.

Other elements of the companion accord included: granting a role to the territories in appointments to the Senate and the Supreme Court, as well as in future First Ministers' conferences; agreement to amend the Constitution to recognize that within New Brunswick, the French and English linguistic communities have equal status and rights; amendment to ensure that the sexual equality rights were in no way affected by the "distinct society clause"; commitment to hold First Ministers' conferences with the Aboriginal Peoples; public hearings on the Canada Clause; and, provision to hold conferences to consider the amending formula, provincehood for the territories, and language issues.

As partially noted, the changes in the Meech Lake Accord in relation to the distinct society clause, the Senate, immigration, the Supreme Court of Canada and the spending power all required amendments to the *Constitution Act, 1867.* The changes to the amending formula would have involved amendments to the *Constitution Act, 1982*, while the provisions requiring First Ministers' Conferences to be held involved a combination of amendments to both statutes.

The Charlottetown Accord

The Charlottetown Accord included all the components of Meech Lake, but added new elements designed to appeal to Quebec, including:

- a perpetual guarantee of 25% of the seats in the House of Commons;

- a double-majority requirement for Senate passage of bills that would materially affect French language or culture (a majority of both Senators and Francophone Senators);

- further restrictions on the federal spending power; and

- an explicit grant to the provinces of exclusive jurisdiction over culture.

However, the Charlottetown Accord was not Quebec-centred. It also included elements designed to appeal to other interests including Western Canada (a reformed Senate), Aboriginal peoples (recognition of the inherent right to self-government), and other constituencies that sought a "Canada clause" and a process to develop a social and economic charter.[70]

The Accord was drafted as a political accord, then later as a draft legal text. The following highlights some of the key elements of the Accord, and explains how some of the earlier issues were further developed.

- *Canada Clause*. Perhaps more than any other, this provision illustrates the contrast between the Meech Lake and Charlottetown processes. Meech Lake had proposed a new section which provided that the Constitution was to be interpreted in a manner consistent with the dual language character of Canada and Quebec's distinct character. The Canada Clause took the same concept — an interpretive clause — but went on to list eight fundamental characteristics of Canada which were to inform the interpretation of the Constitution. In addition to language and Quebec's distinct character, they included characteristics related to matters such as democracy, the Aboriginal peoples, racial and ethnic equality, respect for individual and collective human rights, gender equality and provincial equality.[71]

- *Canada's Social and Economic Union*. During the Charlottetown process pressure grew for further decentralization of powers, particularly from Quebec. Some saw this as a threat to national social programs and a movement had developed seeking some constitutional recognition and protection of these programs. The Accord therefore proposed inclusion of a commitment by governments to the principle of the preservation and development of Canada's social and economic union. This would have included a set of policy objectives related to health care, social services, education, the rights of workers and the environment. The Accord also proposed that the mechanism for monitoring the Social and Economic Union be determined through a First Ministers' Conference.[72]

- *Senate*. Meech Lake had essentially left Senate reform to a later date. In contrast, the Charlottetown Accord proposed a new Senate model which attempted to satisfy the West's desire for a Triple-E Senate — equal representation from the provinces, elected and effective. The Accord proposed the first two and, on the third, attempted to map out a relationship between the Senate and the House of Commons that would give the Senate a more meaningful role in practice. It would have expanded the Senate's role in approving legislation, in particular in relation to French language and culture, and natural resources. Aboriginal representation was also to be guaranteed, with possible provision for a double majority requirement of Aboriginal senators in relation to bills materially affecting Aboriginal people.[73]

- *Supreme Court of Canada*. The proposed changes essentially reflected those from Meech. However, an attempt was also made to lay out a process through

which the role of the Aboriginal peoples in relation to the Supreme Court could be determined.[74]

- *House of Commons*. The Accord proposed changes which would ensure that the composition of the House better reflected the principle of representation by population. It also included a guarantee that Quebec would be assigned no fewer than 25% of the seats in the House. The issue of Aboriginal representation was to be further pursued by Parliament.[75]

- *Spending Power and Immigration*. The Accord included provisions similar to Meech Lake with respect to these two items. However, the Accord also provided for a framework and criteria to guide the exercise of the federal government's spending power.[76]

- *Division of Powers*. While in Meech only the federal spending power and immigration were at issue, the Charlottetown Accord attempted to map out a change, or in some instances a clarification, in responsibilities in fourteen different areas. Driving the proposed changes were an attempt to reduce overlap and duplication in a number of areas and to recognize provincial authority in areas not explicitly recognized in the Constitution, but viewed as being of a provincial nature. As well, the continued use and recognition of intergovernmental agreements in a number of areas was a major theme. Areas of particular interest were immigration, labour market development and training, culture, regional development and telecommunications. While a number of changes in these areas were proposed, it has been suggested that they would have made very little significant change to the division of powers.[77] Finally, a clause was to be included to ensure that amendments to the division of powers would not affect the rights of Aboriginal peoples.[78]

- *Aboriginal Peoples*. The Charlottetown Accord would have accorded constitutional recognition to the inherent right of self-government of the Aboriginal peoples. Though this was the central issue during negotiations, it was, in effect, really the starting point for a host of related issues such as its justiciability (or enforceability), which was to be delayed for five years. The Accord would also have established a commitment on the part of governments to negotiate arrangements which would implement the right of self-government, including issues of jurisdiction, lands and resources, and economic and fiscal arrangements. The Accord laid out a process for negotiation and addressed transitional matters related to the application of federal and provincial laws. A process for further constitutional discussions was also proposed to address matters such as gender equality and financing of Aboriginal governments.[79]

- *The Amending Formula*. The changes to the amending formula were similar to those in Meech. However, amendments related to extending the boundaries of a province or creating new provinces would not have required unanimous consent as in Meech. As well, Aboriginal consent to future constitutional

amendments that directly referred to the Aboriginal peoples would have been required.[80]

As with the Meech Lake Accord, implementation of the changes proposed in the Charlottetown Accord would have required a combination of amendments to the *Constitution Act, 1867* and the *Constitution Act, 1982.*

Round Six?: The Response to the 1995 Quebec Referendum

One of the consequences of the near victory for the sovereignty forces in the recent Quebec referendum were calls immediately thereafter for another referendum vote to be held as soon as possible. Although it was understood that Quebec's *Referendum Act* permitted only one referendum vote to be held on a particular subject during a term of office,[81] it was suggested that either the law could be changed or that an early election could be called, followed by another referendum vote.[82]

Recent statements by Quebec's political leaders suggest that while another referendum will be held, it is not likely to be until after the next Quebec election. Following the referendum, Premier Jacques Parizeau resigned and Lucien Bouchard, the former Leader of the Bloc Québécois, was made the new Leader of the Parti Québécois and Premier of Quebec. Since his appointment, Premier Bouchard has stated that another referendum will not be held until after the next election, which is to be held in either 1998 or 1999; however, he has reaffirmed his intention to seek a mandate in that election to hold another sovereignty referendum.[83]

With the message clear that another attempt will be made to gain support for sovereignty, federal and provincial leaders have had no choice but to begin to plan for another series of constitutional discussions.[84] At the federal level, a number of steps have been taken to address commitments made by the Prime Minister during the referendum campaign. These steps have included:

- adoption by the House of Commons, on December 11, 1996, of a Resolution which recognizes Quebec as a distinct society within Canada in terms of its French-speaking majority, unique culture and tradition of civil law;[85]

- passage of legislation which prohibits the federal government from approving any constitutional amendment without the consent of a majority of the provinces that includes Quebec, Ontario, British Columbia, and two or more of each of the Atlantic and Western provinces, representing 50% of the population of each of those regions;[86] and

- announcement by the federal government of its intention to respect provincial jurisdiction in the fields of education and labour-market training, to be achieved through broader legislation which will reform the unemployment insurance program.[87]

The Chrétien government also struck a "Unity Committee" composed of nine federal cabinet ministers to plan the federal strategy to develop constitutional changes.[88] Although this Committee submitted its report to the Prime Minister in February 1996, it will not be made public.[89]

However, the federal government has since outlined its constitutional strategy in the Speech from the Throne, made on February 27, 1996.

- *Distinct Society and Amending Formula*. The federal government expressed its support for entrenching the recognition of Quebec as a distinct society and the guarantee that no constitutional change, affecting any major region of the country, will take place without the consent of that region.[90]

- *Spending Power*. The government expressed its commitment not to use its spending power to create new shared-cost programs in areas of exclusive provincial jurisdiction without the consent of a majority of the provinces. Any new program will be designed so that non-participating provinces will be compensated, provided they establish equivalent or comparable initiatives.

- *Division of Powers*. The government will transfer to other bodies its responsibilities in relation to some aspects of transportation, and withdraw from areas such as labour market training, forestry, mining, and recreation. It will also propose a strengthened process to work in partnership with the provinces in the areas of food inspection, environmental management, social housing, tourism and freshwater fish habitat.

- *Social Union*. The federal government will work with the provinces to develop agreed-upon values and principles to underlie the social union and to explore new approaches to decision-making in social policy. It will also continue efforts to protect and promote unhampered social mobility between provinces and access to social and other benefits, and will work with the provinces to identify new and mutually agreed upon approaches.

- *Economic Union*. The federal government is committed to improving the Internal Trade Agreement, eliminating barriers to labour mobility and developing a Canadian Securities Commission, a single food inspection service and a national revenue collection agency.

- *National Unity and Culture*. The government is committed to strong Canadian cultural industries and to introducing a new *Citizenship Act*.

- *Aboriginal Peoples*. The government expressed its commitment to incorporate the aspirations of Canada's Aboriginal peoples by pursuing initiatives in partnership with the Aboriginal peoples.[91]

In terms of process, the Throne Speech called for a First Ministers' meeting to be held in the next few months to discuss, among other things, a common agenda for change in Canada. It also stressed the importance of public participation and the

government's commitment to ensuring that any future Quebec referenda are conducted fairly.[92] Since the Throne Speech, the First Ministers' Conference has been tentatively scheduled for June 1996.[93] In preparation for the meeting, federal officials have begun a series of one-on-one meetings with officials from each of the provinces.[94] However, the Prime Minister has indicated that constitutional change will not be on the agenda for the June meeting, although reforming federalism will be discussed.[95]

Most recently, debate has focused on the federal government's decision to intervene in a court proceeding in which a Quebec lawyer is seeking an order preventing future referenda on Quebec sovereignty.[96] The federal government has emphasized that it is not attempting to prevent future referenda, but only wants to ensure that the Constitution and international law are respected.[97] Specifically, the federal government's position is, in part, that a referendum is only a consultation process, and cannot, on its own, form the basis for the unilateral secession of Quebec from Canada. To achieve secession, the Constitution itself might need to be amended.[98]

While the federal government has attempted to confine its role to the determination of the legal effect of a referendum, the Quebec government has argued that the federal government is seeking to thwart the will of the Quebec people in the event they choose sovereignty.[99] The court recently refused to issue a temporary injunction against future referenda being held and the matter will now proceed to a full hearing on the issues in dispute.[100]

Beyond these developments and the immediate steps planned by the federal government, it is difficult to predict the future course of constitutional negotiations. Important dates within which the discussions will occur include April 1997, the time by which the government must convene a constitutional conference on the amending formula (under s. 49 of the *Constitution Act, 1982*).[101] And, of course, if the purpose of a constitutional accommodation of Quebec's concerns is to respond to the message drawn from the October 1995 referendum, that accommodation must be completed, or at least offered to Quebec, before the next Quebec referendum, likely to be held in 1998 or 1999.

Conclusion

The experience of Meech Lake has shown that any attempt to address only the concerns of Quebec will be met with resistance, particularly from those with their own legitimate constitutional demands, such as the Aboriginal peoples. On the other hand, it may be difficult to reach a broad, national consensus on a package of reforms as wide-ranging as those put forward in Charlottetown. The Prime Minister himself has stated that he does not want a broad constitutional debate leading toward a full-scale reform, but would rather deal with problems "one by one."[102]

In light of the failures of Meech Lake and Charlottetown, the question must be asked: Can constitutional change be achieved? If change does occur, one of the chief reasons will certainly be the different outcomes of the 1980 and 1995 Quebec referendums. Constitutional negotiations since 1980 have been undertaken in the knowledge that the sovereignty option was soundly defeated — by a 60% to 40% vote. Under these conditions, the prospect of a divided Canada seemed unlikely. Constitutional discussions focused on the relative merits of the status quo versus the proposed changes; not on the possibility of a divided Canada.

But the narrow escape from a sovereignty "yes" vote in October 1995 presents a different context for negotiations. Comprehensive constitutional change most often occurs when the stakes are high. As Professor Peter Russell has stated:

> No liberal democratic state has accomplished comprehensive constitutional change outside the context of some cataclysmic situation such as revolution, world war, the withdrawal of empire, civil war, or the threat of imminent breakup. A country must have a sense that its back is to the wall for its leaders and its people to have the will to accommodate their differences.[103]

No one who witnessed the reporting of the referendum results and watched as momentum only slowly and barely swung to a "no" vote — 50.6% to 49.4% — can deny that the country faced the "threat of imminent breakup." The context for constitutional negotiations has clearly changed. But whether the realization — that Quebec sovereignty exists as a real possibility — will be enough to bring together all of the divergent views on constitutional change remains to be seen.

NOTES

[1] Peter W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), p. 3.

[2] Ibid., p. 4.

[3] Ibid., p. 8.

[4] *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982* (U.K.) 1982, c. 11, s. 52(1).

[5] Ibid., s. 52(3).

[6] Ibid., pp. 9-10.

[7] Ibid., pp. 17-18.

[8] *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.

[9] Hogg, *Constitutional Law of Canada*, 3rd ed., pp. 4-7.

[10] *Constitution Act, 1867*, Parts II, III, IV, V, VI, VII and XI, respectively.

[11] *Constitution Act, 1982*, Parts I, II, III, V and VI, respectively.

[12] Hogg, *Constitutional Law of Canada*, 3rd ed., pp. 45-46.

[13] [1926] A.C. 482.

[14] Hogg, *Constitutional Law of Canada*, 3rd ed., pp. 48-49.

[15] Ibid., p. 49.

[16] R.S.C. 1985, Appendix II, No. 27.

[17]Hogg, *Constitutional Law of Canada*, 3rd ed., pp. 49-50.

[18] P.H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd ed. (Toronto: University of Toronto Press, 1993), pp. 55-57.

[19] P. H. Russell, "The End of Mega Constitutional Politics in Canada?", in K. McRoberts and Patrick J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993), p. 213.

[20] Russell, *Constitutional Odyssey*, Chs. 6 to 11.

[21] Ibid., pp. 72-74.

[22] Ibid., pp. 77-79.

[23] Ibid., pp. 85-87.

[24] Ibid., pp. 87-91.

[25] *Calder v. A.G. (B.C.)* [1973] S.C.R. 313.

[26] Russell, *Constitutional Odyssey*, pp. 92-96.

[27] Task Force on Canadian Unity, *A Future Together: Observations and Recommendations* (Ottawa: Supply and Services Canada, 1979).

[28] Prime Minister's Office, *A Time for Action: Toward the Renewal of the Canadian Federation* (Ottawa: Government of Canada, 1978).

[29] Gouvernement du Québec, *Quebec-Canada: A New Deal: The Quebec Government Proposal for a New Partnership Between Quebec and Canada* (Québec: Conseil Executif, 1979).

[30] Russell, *Constitutional Odyssey*, pp. 98-102.

[31] Ibid., pp. 104-106.

[32] Although Trudeau did subsequently initiate constitutional change, there is continuing debate as to whether doing so in a way which did not meet Quebec's aspirations satisfied the commitment he had made. See: Russell, *Constitutional Odyssey*, pp. 108-109.

[33] Russell, *Constitutional Odyssey*, pp. 107-111.

[34] Ibid., pp. 113-114.

[35] *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753, p. 905.

[36] Russell, *Constitutional Odyssey*, pp. 118-122. Other changes were also made to address concerns raised by the inclusion of an override clause in the *Charter of Rights* and the decision to drop recognition of aboriginal rights.

[37] Ibid., p. 123.

[38] *Re Objection by Que. to Resolution to Amend the Constitution* [1982] 2 S.C.R. 793.

[39] *Constitution Act, 1982,* s. 37.

[40] *Constitution Amendment Proclamation*, R.S.C. 1985, App. II, No. 46, substituting s. 25(b), and adding ss. 35(3) and (4), ss. 35.1 and 37.1 to the *Constitution Act, 1982.*

[41] Russell, *Constitutional Odyssey*, pp. 130-132.

[42] Ibid., pp. 133-136. The details of the Meech Lake Accord are discussed in greater detail later in the paper.

[43] Ibid., pp. 140-141.

[44] Ibid., pp. 142-144.

[45] *Ford v. Que.* [1988] S.C.R. 712.

[46] Russell, *Constitutional Odyssey*, pp. 145-148.

[47] Ibid., pp. 149-151.

[48] Ibid., pp. 151-153.

[49] Constitutional Committee of the Québec Liberal Party, *A Quebec Free to Choose*, January 1991.

[50] *Report of the Commission on the Political and Constitutional Future of Quebec*, Québec, March 1991.

[51] Russell, *Constitutional Odyssey*, pp. 155-162.

[52] Ibid., pp. 162-163.

[53] *Citizen's Forum on Canada's Future* (Ottawa: Minister of Supply and Services, 1991).

[54] Russell, *Constitutional Odyssey*, pp. 163-168.

[55] Ibid., pp. 170-174

[56] Ibid., p. 176.

[57] Ibid., pp. 180-181.

[58] Ibid., pp. 192-193.

[59] Ibid., pp. 220-222.

[60]Ibid., pp. 220, 227.

[61] Section 49, *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11.

[62] Peter W. Hogg, *Meech Lake Constitutional Accord Annotated* (Toronto: Carswell, 1988), p. 4.

[63] Ibid., pp. 11-12; and *1987 Constitutional Accord*, Schedule, Constitution Amendment, 1987, Clause 1.

[64] Ibid., pp. 17 and 51, and *Accord*, Clauses 2 and 8..

[65] Ibid., pp. 21-25 and *Accord*, Clause 3.

[66] Ibid., pp.27-36 and *Accord*, Clauses 4-5.

[67] Ibid., pp. 37-42 and *Accord*, Clause 7.

[68] Ibid., pp. 43-49 and *Accord*, Clauses 9-12.

[69] Ibid., pp. 51-54 and *Accord*, Clause 8.

[70] Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, looseleaf), as of 1995 - Rel. 1, pp. 4-9 to 4-10, notes 40a and 40b.

[71] *Consensus Report on the Constitution: Final Text* (Charlottetown, 28 August 1992), Appendix 1 in McRoberts and Monahan, eds., *The Charlottetown Accord, the Referendum and the Future of Canada*, Section I, A, para. 1.

[72] Ibid., Section I, B, para. 4.

[73] Ibid., Section II, A, paras. 7-16.

[74] Ibid., Section II, B, paras. 17-20.

[75] Ibid., Section II, C, paras. 21-22.

[76] Ibid., Section III, paras. 25, 27.

[77] Peter W. Hogg, "Division of Powers in the Charlottetown Accord," in *The Charlottetown Accord, the Referendum and the Future of Canada*, ed. K. McRoberts and P. Monahan (Toronto: University of Toronto Press, 1993), p. 92.

[78] *Charlottetown Accord*, Section III, paras. 25-40.

[79] Ibid., Section IV, paras. 41-56.

[80] Ibid., Section V, paras. 57-60.

[81] R.S.Q., c. C-64.1, s. 12.

[82] Anthony Wilson-Smith, "Will he or won't he: Lucien Bouchard faces a crucial choice," *Maclean's* (13 November 1995): 16-17.

[83] Robert McKenzie, "Sovereignty still a priority: Bouchard," *Toronto Star*, 19 March 1996, p. A7.

[84] As federal minister Lucienne Robillard, the leader of Chrétien's team during the referendum campaign, has stated: "There is a kind of emergency in this country by the result of the referendum." See: Shawn McCarthy, "PM eyes way to improve federation," *Globe & Mail*, 22 November 1995, p. A12.

[85] Canada, Parliament, House of Commons, *Debates: Official Report*, 35th Parliament, 1st Session (11 December 1995): 17536.

[86] Bill C-110, *An Act respecting constitutional amendments*, 1st Sess., 35th Parl. 42-43-44 Eliz. II, 1994-95 (assented to 2 February 1996).

[87] Canada, Office of the Prime Minister, "The Prime Minister Delivers on Referendum Commitments With Initiatives For Change," *News Release*, 27 November 1995.

[88] Susan Delacourt, "Unity panel formed to draft changes," *Globe & Mail*, 8 November 1995, p. A4.

[89] Telephone interview with Leslie Swartman, Prime Minister's Office, Government of Canada, 14 March 1996.

[90] Since the Throne Speech, the Quebec wing of the federal Liberal Party has adopted a resolution which states that it is no longer demanding that Quebec be recognized as a "distinct society," but rather will settle for an acknowledgment that Quebec is the principal homeland of the French language, culture and legal tradition in North America. The Prime Minister has taken the position that this resolution merely represents one suggestion on how the distinct nature of Quebec may be recognized. See: Anne McIlroy, "Liberal wing takes 'distinct' shift," *Globe & Mail*, 15 April 1996, p. A1.

[91] Canada, Governor General's Office, *Speech from the Throne* (Ottawa: Queen's Printer, 1996), pp. 6-9.

[92] Ibid.

[93] E. Stewart, "Is a new term needed for 'distinct society?'", *Toronto Star*, 9 April 1996, p. A2.

[94] Ibid.

[95] Anne McIlroy, "Liberal wing takes 'distinct' shift," *Globe & Mail*, 15 April 1996, p. A5.

[96] Hugh Windsor and Rhéal Seguin, "Ottawa Ponders Joining Referendum Suit," *Globe & Mail*, 3 May 1996, p. A5.

[97] Tu Thanh Ha, "Dion warns PQ of chaos," *Globe & Mail*, 18 May 1996, p. A4.

[98] Anne McIlroy, "Quebec can't just leave, PM says," *Globe & Mail*, 15 May 1996, p. A1.

[99] Ibid.

[100] "Bertrand's injunction bid fails," *Globe & Mail*, 24 May 1996, p. A4.

[101] The text of s. 49 reads as follows: